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Ashworth Transfer, Inc. and Salt Lake Transfer Co. v. Public Service Commission of Utah : Brief of Defendants

Utah Supreme Court

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IN THE SUPREME COURT

of the

STATE OF UTAH

ASHWORTH TRANSFER, INC.
and SALT LAKE TRANSFER CO.,

Plaintiffs,

—vs.—

PUBLIC SERVICE COMMISSION
OF UTAH; HAL S. BENNETT,
DONALD HACKING and JESSE
R. S. BUDGE, its Commissioners;
BARTON TRUCK LINE, INC.,

Defendants.

FILED
Supreme Court
Case No.
9713

BRIEF OF DEFENDANTS

Appeal from Order of the Public Service Commission
of Utah

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BARTON TRUCK LINE, INC.,
Defendants.

Case No.
9713

BRIEF OF DEFENDANTS

STATEMENT OF KIND OF CASE

Ashworth Transfer, Inc., and Salt Lake Transfer Co. (hereinafter referred to as plaintiffs) appealed from an Order of the Public Service Commission of Utah granting defendant Barton Truck Line, Inc. (hereinafter referred to as Barton) authority to haul commodities from Salt Lake City north to the Utah-Idaho state line.

Plaintiffs' appeal is limited to that portion of the Order granting Barton authority to haul explosives.

DISPOSITION OF CASE BEFORE THE PUBLIC SERVICE COMMISSION

On May 14, 1962, the Public Service Commission of Utah entered an Order granting certain authority to Barton, a portion of which is as follows:

NOW THEREFORE, IT IS HEREBY ORDERED, that Barton Truck Line, Inc., be and it is hereby issued Certificate of Convenience and Necessity No. 1074-Sub 5, authorizing operation as a common carrier by motor vehicle in the transportation of general commodities, including explosives, but excluding household goods as defined in practices of motor carriers of household goods in 17MCC467, commodities in bulk and commodities in connection with the transportation of which, because of size or weight requires the use of special equipment or special service in preparing said commodities for shipment or setting up after delivery:

Between Ogden on the one hand and the Utah-Idaho State Line at the junctures of U. S. Highways 30S, 191, and 91, on the other, over U.S. Highways Nos. 30S, 89, 91, and 191 and all intermediate and off-route points

north of Salt Lake City within a ten-mile radius of U. S. Highways 30S, 89, 91, and 191, and the Thiokol Chemical Corporation plant, and government installations in the same area located on Utah Highway 83 approximately 20 miles west of Corrine, Utah, except no service is authorized between a point ten miles east of Logan and the Utah-Idaho State Line on U. S. Highway 89.

Also, the transportation of explosives between Salt Lake City, Utah, and Ogden, Utah, and intermediate points such as Hill Air Force Base, Utah. (R. 1090)

STATEMENT OF FACTS

Barton and three other carriers filed an application to replace the service previously afforded by Wasatch Fast Freight, a wholly owned subsidiary of Consolidated Freightways, Inc. (hereinafter referred to as Wasatch). Wasatch had applied to the Public Service Commission of Utah to be relieved of its obligation to serve from Salt Lake City north to the Utah-Idaho state line and intermediate points, as well as to be relieved of explosive authority identical to that which was granted to Barton by the order of May 14, 1962. (R. 1084, 1085). The disposition of the Wasatch application had not been ruled upon at the time of hearing of Barton's application to extend its authority. (R. 22). Consecutive hearings were held commencing April 11, 1962, and lasting until completed, in the following order :

1. Barton Truck Line, Inc., Case No. 4009-Sub 7
2. Beehive Motor Lines, Case No. 5102
3. Carbon Motorway, Inc., Case No. 3815—Sub 8
4. Wycoff Company, Incorporated, Case No. 4252-Sub 10

At the time of filing for an extension of authority, Barton was authorized to serve Salt Lake City and Ogden, together with intermediate and off-route points. Barton sought to extend its existing authority to include points north of Ogden to the Utah-Idaho state line. At the commencement of the Barton hearing a motion was made to have the Commission take judicial notice of the application of Wasatch to abandon its authority presently held, including explosive authority. Objections were asked for and none being received, the Commission, through Commissioner Hacking, stated:

“Well, the record may show that there has been an application filed by Consolidated to abandon and discontinue their intrastate services in the Salt Lake-northern Utah area.” (R. 21, 22)

Mr. Harold Tate, Vice President and General Man-

ager of Barton, was called as a witness. He testified as to Barton's existing explosive authority. (R. 19). He also testified:

"Now, in the past we have had interline arrangements with Wasatch Fast Freight at Salt Lake City to handle these explosives shipments to those points that we do not presently have explosive authority. I am very often requested — I should say, our Company is requested — to handle rush type shipments of explosives between Tooele Ordnance Depot and those western Utah installations, and more particularly, Hill Air Force Base in the Ogden area." (R. 20)

Mr. Tate also testified:

"... without an interline arrangement — it would be a very, very difficult task for us to serve these installations in the same way we are serving them presently." (R. 23)

Mr. Ronald Ray, head of the transportation and traffic of Thiokol Chemical Corporation also testified. While Mr. Ray testified that he was neither supporting the application (R. 199) nor protesting it (R. 203), he did offer testimony pertinent to the need of additional explosive authority. Mr. Ray testified:

"And, with the reduction of Wasatch Fast Freight, should their pending application be ap-

proved, it would greatly inconvenience and hamper our operations.

“ . . . we have tried, as a corporation, to keep our own vehicles out of the transportation of explosives. . . .” (R 187)

Mr. Ray also testified as to a need to have rocket engines transported. These engines, when loaded for shipment, carry their own fuel and are shipped as explosives, Class B. (R. 195). Mr. Ray testified that Ashworth, Consolidated Freightways, Wasatch Division, and Salt Lake Transfer were then engaged in the outbound transportation of rocket engines. (R. 188). He also testified that “. . . it has been a job that three carriers have been able to do satisfactorily, and we feel that two, with the increased amount, would not be able to accomplish.” (sic) (R. 189)

The Commission also had before it the fact that plaintiffs published tariff minimums. G. Grant Sims, one of the partners in Salt Lake Transfer Co., testified as follows:

“Q. Mr. Sims, regarding the weight restrictions, do you have any weight restrictions on explosive movements, say between Salt Lake City and Ogden?

A. We have a published tariff of a 4,000 minimum, due to the expediency of some of our

service that has been acceptable by military installations and other customers. Recently, as recently as a week ago Saturday night, I moved a 24-pound explosive item from Bacchus to Hill Field and return from Hill Field to Bacchus with a 17-pound item.

Q. But, on your 4,000-pound minimum rate —

A. We have a 4,000 pound minimum rate.

Q. So, for the 27-pound movement, you charged the 4,000-minimum rate?

A. Yes, sir.” (R. 312)

Mr. Rulon C. Ashworth, Jr., Vice President of Ashworth, testified as follows :

“Q. You have no minimum?

A. We have a minimum in our tariff, if that is what you mean.

Q. And what is the minimum?

A. Two thousand pounds.

Q. And on a shipment, say, of 10 pounds between Ogden and Salt Lake, you would charge the rate on 2,000-pounds?

A. We would charge the minimum, yes, as provided in the tariff." (R. 321, 322)

Mr. Ray of Thiokol raised strong objection to the whole matter of tariff minimums. He stated that because of tariff minimums Thiokol was forced to use its own trucks at increased expense and inconvenience. (R. 198) And further: "Our belief on this is that a — while there may be a rate matter, a service is offered which is ridiculous, which we can't afford, so, therefore, there is no service offered to us." (R. 196, 197)

Mr. Gibson, Vice President and Secretary-Treasurer of Western Powder Company, also testified with respect to the need for explosive authority as follows:

"Q. Now, I take it you are aware of the fact that Wasatch Fast Freight has filed an application here for abandonment of its operations in Utah?

A. Yes, sir.

Q. And in the movement of your explosives, what carriers have you used in northern Utah?

A. Wasatch Fast Freight and Barton.

Q. And have you used Wycoff at all?

A. No, sir."

* * *

Q. And what about the rails, have you used them?

A. On occasion. Very seldom.

Q. Does the rail service available fulfill your requirements?

A. Except for emergencies.

Q. What?

A. In order to ship by rail, you have to notify them ahead of time, and they have to get a car inspected, and sometimes there is delays in that because they are limited to shipping in what I would call first-class cars, and they have to get a car inspected, so it is subject to transport explosives.

Q. And what about Ashworth and Salt Lake Transfer, do you use them on these small shipments?

A. Oh, yes, but there they have a minimum of 4,000 pounds, a minimum rate on 4,000 pounds, and these shipments, it wouldn't be economical to run them because they run considerably less than that.

Q. I don't know—did you give us an estimate as to the average size of these smaller shipments you are talking about?

A. Oh, they will run all the way from slightly under 100 pounds up to 500 pounds, 700 pounds, the last couple that moved up there recently, 750 pounds.” (R. 536, 537)

Mr. James E. Sullivan, representing George Lowe Hardware Company of Ogden, Utah, testified to the needs of his Company, as follows:

“Q. And on the shipment of powder, you are aware of the fact that Ashworth Transfer and Salt Lake Transfer are available to transport explosives for you, aren't you?

A. That may be so. I wasn't aware of that, no.

Q. Have you ever solicited them or used their service on explosives?

A. Well, there wouldn't be a large enough quantity there to use their service, I don't believe."
(R. 708)

At the request of the Commission, Mr. Harold Tate of Barton was ordered to produce a breakdown of the interline shipments of explosive materials which Barton had engaged in with Wasatch. Such an exhibit was prepared and received without objection (R. 143), and is filed in the Record as page 1110. This exhibit shows that during the year 1961 this interline handled 1,013,531 pounds.

At the conclusion of the last hearing, being that of Wyeoff, the Commission incorporated by reference, without objection from plaintiffs, the testimony adduced in each case into each of the other cases and consolidated the records of the respective cases for the purpose of determining which applicant, if any, should be granted such authority as the public required. (R. 1037). Thereafter, on May 14, 1962, the Commission entered its Order granting the application of Barton. (R. 1090). This Order granted Barton specific authority to transport explosives in the area in which Wasatch had previously held explosive authority. Thereafter, plaintiffs petitioned for a

review of this portion of the Commission's Order.

STATEMENT OF POINTS

POINT I

THE RECORD CONTAINS SUFFICIENT EVIDENCE TO SUPPORT THE FINDING OF THE COMMISSION GRANTING EXPLOSIVE AUTHORITY TO BARTON.

ARGUMENT

POINT I

THE RECORD CONTAINS SUFFICIENT EVIDENCE TO SUPPORT THE FINDING OF THE COMMISSION GRANTING EXPLOSIVE AUTHORITY TO BARTON.

Defendants will meet all of the arguments of plaintiffs in this single point rather than be repetitious of the same legal principle which is the basis for all arguments propounded by plaintiffs.

If the Commission had before it evidence to warrant the Findings of Fact and Conclusions of Law entered in

support of its Order, then the Commission has properly exercised its administrative duties under the law. (*Lake Shore Motor Coach Lines, Inc. v. Welling*, 9 Utah 2d 114, 117; 339 P.2d 1011)

The interline evidence which was received (R. 143) clearly shows that substantial quantities of explosives are moved under Barton's existing authority from or to the north portion of the Wasatch Front area. Ashworth has a 2,000-pound minimum tariff (R. 321) and Salt Lake Transfer has a 4,000-pound minimum tariff (R. 312). If a shipper in the Tooele area desired to move a 20-pound shipment of explosive material from Tooele to Hill Air Force Base, Barton could be called to bring the shipment to Salt Lake City. But, because of the tariff minimums of Ashworth and Salt Lake Transfer, Barton would have no interline available at reasonable rates to forward the shipment. This is an obvious hardship on the shipping public, which would result in increased costs or in the alternative the use of private vehicles.

A careful examination of Barton's Exhibit 4 (R. 1110) shows that an average of two shipments per month, which Barton interlined with Wasatch, would not have met the tariff minimum of plaintiff Ashworth, and an average of 2½ shipments per month would not have met minimum tariff weights of plaintiff Salt Lake Transfer. This is sufficient evidence upon which to base a finding

by the Commission of the meeting of public convenience and necessity.

The Commission proceedings did not have before it statistics evidencing the number of explosive hauls which Wasatch had rendered on behalf of Thiokol in moving the Thiokol manufactured missile engines. However, its representative, Mr. Ray, testified as to the need of a replacement carrier for this service :

“The third is a service capable of meeting our outbound needs on rocket engines. With the present pending application of Wasatch Fast Freight to abandon, this would leave us short one carrier in this service and greatly penalize our—” (R. 186)

Mr. Ray further testified :

“And, with the reduction of Wasatch Fast Freight, should their pending application be approved, it would greatly inconvenience and hamper our operations. And, along with this, we have tried, as a corporation, to keep our own vehicles out of the transportation of explosives—this is from a public relations standpoint.” (R. 187)

Under the legal authority vested in the Commission it may impose in its discretion whatever restrictions it deems necessary on an applicant or existing utility to

effectuate adequate service as required by the public needs. (*Utah Code Annotated*, 1953, 54-6-4, 5)

In the instant case, the Commission had two alternatives, the first being to compel plaintiffs to publish substantially lower tariffs than were presently being published in order to eliminate the void which would be left in the event that the application of Wasatch to abandon was granted. Defendants submit that nowhere in the Record is an offer by plaintiffs to publish lower tariffs. The alternative to this is to grant a Certificate of Convenience and Necessity to a common motor carrier, so as to enable the shipping public to have the required motor carrier service at fair rates for purposes of transporting explosives.

In effect the granting of the application of Barton to haul explosives was a proper discretionary decision within the power and authority of the Public Service Commission of the State of Utah.

With respect to the contention of plaintiffs that they have full authority to perform explosive services, defendants cannot rebut same, as this is a matter of record, inasmuch as both plaintiffs have filed copies of their existing authority at the time of the hearing and the validity and scope of same cannot be urged. However, defendants contend that the need for replacement author-

ity exists in the event of approval of the application Wasatch. Plaintiffs' brief takes out of context the statement made by Mr. Gibson, of Western Powder, and fails to add the rest of his testimony.

“Q. I believe you stated that you used the service of Salt Lake Transfer and Ashworth Transfer, Sir?

A. Yes.

Q. Have you found them, where you have used it, to be satisfactory?

A. Where they were usable to us they were perfect.” (R. 543)

The words *arbitrary* and *capricious* are nothing more than a legal phrase on which to predicate an appeal by the losing parties in the instant case. In order to sustain the findings of the Commission evidence must exist to support their conclusions: *Ogden Iron Works Industrial Commission*, 102 Utah 492, 132 P.2d 376, 377; *Salt Lake-Kanab Freight Lines, Inc. v. A. B. Robinson Truck Line*, 9 Utah 2d 99, 339 P.2d 99, 101, (wherein the Court held: “We will not disturb the findings of the Commission if supported by substantial evidence and a reasonable in view of the evidence.”)

The scope of review of this Court is limited to ascertaining whether the conclusions of the Commission are reasonable (*Utah Code Annotated* 1953, 54-7-16):

"Review shall not be extended further than to determine whether the Commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of the state of Utah. Findings and conclusions of the Commission on questions of fact shall be final and shall not be subject to review."

This Court has upheld and sustained the Commission's authority in the following cases: *Salt Lake City v. Utah Light & Traction Co.*, 52 Utah 210, 173 P. 556, 3 A. L. R. 715; *Mulcahy v. Public Service Commission, et al.*, 101 Utah 245, 249, 117 P.2d 298; *Salt Lake Transfer Co. and Ashworth Transfer Co. v. Public Service Commission of Utah and Barton Truck Lines, Inc.*, 11 Utah 2d 121, 335 P.2d 706.

Defendants rely upon the following cases for establishing the amount of evidence required to support the findings of the Commission: *Ashworth Transfer Co. v. Public Service Commission of Utah*, 2 Utah 2d 23, 268 P.2d 990, 994; and *Lake Short Motor Coach Lines, Inc. v. Welling*, 9 Utah 2d 114, 339 P.2d 1011, in which case

the defendant Welling appeared and testified on his own behalf, without corroborating testimony, as to the results of a personal survey which he had taken and his observations with respect to the need of service in accordance with his application. This Court found that the opinion testimony of Welling alone was sufficient to uphold the Order of the Commission even though Welling had failed to adhere to procedural practices of this Court by filing an appeal brief and appearing for purposes of arguing same at the time set by this Court.

Plaintiffs rely upon a previous case decided by this Court, wherein the parties were the same as the parties to this appeal (Salt Lake Transfer Co. and Ashworth Transfer Co., Inc. v. Public Service Commission of Utah and Barton Truck Line, Inc., *supra*). That case is not a case in point, in that the Commission had before it the question of granting *additional* authority to transport explosives between Salt Lake City and Ogden, without testimony supporting the need therefor. This Court found (11 Ut. 2d 121, 127) :

“A search of the record reveals nothing upon which to base the conclusions that *the addition of* Barton’s service will in any way add to the public convenience and necessity with regard to explosives. As the record now stands, Ashworth and Salt Lake Transfer are rendering an adequate service in the transfer of explosives. Before *additional* service is authorized by the Commission,

the applicant must show that the existing service is not adequate **and convenient** and that his proposed operation would eliminate the inadequacy and inconvenience." (Emphasis ours.)

In the instant appeal, the Commission has taken judicial notice of the application of Wasatch to abandon service:

"Mr. Tuft: May the record so show, Mr. Commissioner, that the Wasatch Fast Freight has filed application and the matter has been heard **and** is now pending before the Commission, an application to abandon their authority presently held **into** northern Utah, and, more particularly, for the purpose of this line of questioning, those points sought by the applicant in its application for the transportation of explosives?

"Com. Hacking: Is there any objection to the record **showing** that fact?

"Mr. Worsley: I don't think there could be. It is **a matter** of judicial knowledge of the Commission." (R. 21)

The record shows that no objection was heard to this request by defendants' counsel.

Defendants contend that since nothing will be taken

away from the plaintiffs within their present scope of operating authority, the Commission properly exercised its discretion in finding that the area from Salt Lake to Ogden required a *replacement* carrier for that of Wasatch, and that *replacing* the services of Wasatch would not in any way prejudice the existing rights of plaintiffs. To contend that this finding is *arbitrary and capricious*, or is contrary to law, cannot be sustained in view of the evidence before the Commission.

CONCLUSION

Defendants submit that competent evidence was before the Public Service Commission of the State of Utah showing that a *replacement* carrier was needed in the event that the Commission ruled in favor of the application of Wasatch to abandon its services.

We respectfully submit that this Court should order that the grant of explosive authority to Barton be affirmed.

TUFT AND MARSHALL

By: J. REED TUFT and

ROBERT M. McRAE

*Attorneys for Barton Truck
Line, Inc.*